A

VIJAYA KUMAR TANAPALAN & SATU LAGI lwn. PP & SATU LAGI RAYUAN

MAHKAMAH RAYUAN, PUTRAJAYA
MOHTARUDIN BAKI HMR
ZAKARIA SAM HMR
B AHMADI ASNAWI HMR
[RAYUAN JENAYAH NO: A-05-394-12-2014 & A-05-23-02-2015]
4 FEBRUARI 2016

C ***PROSEDUR JENAYAH:*** *Pertuduhan – Pindaan – Dadah berbahaya – Hakim bicara meminda pertuduhan kesalahan pengedaran kepada kesalahan milikan – Dadah dijumpai dalam sebuah bilik berhampiran dengan kedua-dua tertuduh – Sama ada kedua-dua tertuduh mempunyai kawalan, jagaan dan pengetahuan tentang dadah – Kegagalan hakim bicara menilai keterangan pembelaan – Sama ada satu ketinggalan serius – Sama ada kedua-dua tertuduh berjaya mengakas*
D *andaian pengedaran di bawah s. 37(da)(iiia) Akta Dadah Berbahaya 1952 – Imbangan kebarangkalian – Sama ada sabitan dan hukuman di bawah kesalahan milikan diketepikan dan digantikan dengan sabitan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952*

E ***UNDANG-UNDANG JENAYAH:*** *Akta Dadah Berbahaya 1952 – Seksyen 39B(1)(a) – Pengedaran – Pindaan pertuduhan – Hakim bicara meminda pertuduhan kesalahan pengedaran kepada kesalahan milikan – Dadah dijumpai dalam sebuah bilik berhampiran dengan kedua-dua tertuduh – Sama ada kedua-dua tertuduh mempunyai kawalan, jagaan dan pengetahuan mengenai dadah – Kegagalan hakim bicara menilai keterangan pembelaan – Sama ada satu*
F *ketinggalan serius – Sama ada kedua-dua tertuduh berjaya mengakas andaian pengedaran di bawah s. 37(da)(iiia) Akta Dadah Berbahaya 1952 – Imbangan kebarangkalian – Sama ada sabitan dan hukuman di bawah kesalahan milikan diketepikan dan digantikan dengan sabitan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952*

G Tertuduh pertama dan kedua ('OKT1 dan OKT2') dipertuduh mengedar dadah berbahaya sejumlah 24.75g heroin dan monoacetylmorphines, satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB 1952'). Pada 5 April 2012, SP4 dan pasukannya membuat serbuan ke sebuah rumah. Apabila sampai ke rumah tersebut, SP4 dan anggotanya naik ke tingkat atas
H rumah tersebut di mana terdapat sebuah bilik stor yang berkunci dari dalam. Apabila pintu tersebut dipecah masuk, SP4 mendapati OKT1 berdiri di hadapan sebuah meja manakala OKT2 pula cuba melarikan diri tetapi berjaya ditangkap. Di atas meja tersebut ditemui dua paket plastik dan 107 paket plastik kecil berisi serbuk disyaki dadah berbahaya. Dalam pembelaan
I mereka, OKT1 memberi keterangan bersumpah, manakala OKT2 pula hanya memberi keterangan tanpa sumpah. Mereka menghujahkan bahawa (i) kedua-dua mereka ditangkap di luar bilik setor berkenaan; (ii) mereka tidak tahu kewujudan dadah-dadah tersebut dalam bilik stor itu; dan (iii) bilik setor itu

boleh dimasuki oleh sesiapa sahaja. Di akhir kes pembelaan, hakim bicara mengguna pakai s. 37(d) ADB 1952 dan mensabitkan kedua-dua OKT atas kesalahan milikan dan melepaskan dan membebaskan kedua-dua OKT di bawah kesalahan mengedar. Hakim bicara menjatuhkan hukuman terhadap kedua-dua OKT1 dan OKT2 iaitu hukuman penjara 15 tahun dan sepuluh sebatan. OKT1 dan OKT2 merayu terhadap sabitan dan hukuman tersebut manakala Pendakwa Raya merayu supaya OKT1 dan OKT2 disabitkan di bawah pertuduhan asal iaitu kesalahan mengedar.

Diputuskan (menolak rayuan OKT1 dan OKT2; membenarkan rayuan Pendakwa Raya)

Oleh Mohtarudin Baki HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara membuat dapatan bahawa (i) pintu bilik setor tersebut dikunci dari dalam; (ii) hanya kedua-dua OKT berada di dalam bilik setor tersebut, dan mereka berdiri berhampiran dengan sebuah meja di mana dadah-dadah berbahaya dijumpai; (iii) perlakuan OKT2 cuba melarikan diri tetapi berjaya ditangkap; dan (iv) bagi elemen pengedaran pula hakim bicara telah menerima pakai s. 37(da)(iiia) ADB 1952. Atas alasan-alasan tersebut, dakwaan bahawa hakim bicara gagal membuat 'affirmative finding' sama ada mengguna pakai s. 37(d) ADB 1952 atau tidak di akhir kes pendakwaan adalah tidak tepat. Hakim bicara tidak diwajibkan memberi alasan apabila memutuskan bahawa kes *prima facie* telah dibuktikan. Kawalan, jagaan dan pengetahuan perlu dilihat dari keterangan sekeliling. Inferens yang tidak boleh disangkal adalah bahawa OKT1 dan OKT2 mempunyai kawalan, jagaan dan pengetahuan terhadap dadah-dadah tersebut. (perenggan 25, 26 & 35)

(2) Perlakuan OKT2 yang cuba melarikan diri perlu dilihat secara objektif. Keterangan tanpa sumpah sahaja tidak membawa nilai probatif yang tinggi untuk menimbulkan keraguan munasabah. Kegagalan hakim bicara menguji keterangan pembelaan dengan kes pendakwaan adalah suatu ketinggalan serius yang memerlukan campur tangan rayuan. Hakim bicara juga tersalah arah diri dari segi undang-undang dan fakta. (perenggan 37)

(3) OKT1 dan OKT2 tidak mengemukakan apa-apa keterangan untuk mengakas andaian pengedaran di bawah s. 37(da)(iiia) ADB 1952. Apatah lagi beban untuk mengakas andaian undang-undang adalah atas imbangan kebarangkalian. Oleh itu, sabitan dan hukuman OKT1 dan OKT2 di bawah kesalahan milikan diketepikan dan digantikan dengan sabitan terhadap pertuduhan mengedar dadah berbahaya di bawah s. 39B(1)(a) ADB 1952 dibaca bersama-sama dengan s. 34 Kanun Keseksaan, serta hukuman di bawah s. 39B(2) ADB 1952 yang sama iaitu kedua-dua OKT dijatuhkan hukuman mati mandatori. (perenggan 38 & 39)

***English** Headnotes*

The accused persons ('OKT1 and OKT2') were charged with trafficking in dangerous drugs weighing 24.75g of heroin and monoacetylmorphines, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA 1952'). On 5 April 2012, SP4 and his team raided a house. Upon reaching the said house, SP4 and his team had gone upstairs where they found a store room that was locked from the inside. When the said door was broken down, SP4 found OKT1 standing in front of a table while OKT2 had tried to escape but was successfully apprehended. On the said table there were two plastic packages and 107 small plastic packages containing powdery substance suspected to be dangerous drugs. In their defence, OKT1 had given a sworn testimony while OKT2 had given an unsworn testimony. Both the accused persons submitted that (i) they were both detained outside the store room; (ii) they did not know of the existence of the said drugs in the store room; and (iii) the store room was accessible by anyone. At the end of the case for the defence, the trial judge had applied s. 37(d) DDA 1952 and convicted both the accused persons for the offence of possession and acquitted and discharged both the accused persons from the offence of trafficking. The trial judge sentenced both OKT1 and 2 to 15 years imprisonment and 10 strokes of the rotan. OKT1 and 2 appealed against the said conviction and sentence while the prosecution appealed for OKT1 and OKT2 to be convicted under the original charge of trafficking.

Held (dismissing OKT1 and OKT2's appeal; allowing prosecution's appeal)
Per Mohtarudin Baki JCA delivering the judgment of the court:

(1) The trial judge found that (i) the door to the said store room had been locked from inside; (ii) only the two accused persons were in the said store room and they had been in close proximity with the table where the dangerous drugs were discovered; (iii) the conduct of OKT2 in attempting to escape but was successfully apprehended; and (iv) as for the element of trafficking the trial judge had adopted s. 37(da)(iiia) DDA 1952. Based on the reasons, the claim that the trial judge had failed to make an affirmative finding on whether to apply s. 37(d) DDA 1952 at the end of the prosecution's case was not accurate. The trial judge was not required to give his reasons when holding that a *prima facie* had been established. Custody, control and knowledge should be looked at from the surrounding circumstances. It was therefore an irresistible inference that OKT1 and OKT2 had control, custody and knowledge of the said drugs.

(2) The conduct of OKT2 who had attempted to escape should be viewed objectively. The unsworn statement on its own did not bring any high probative value to raise a reasonable doubt. The failure of the trial judge

in examining the evidence of the defence with the prosecution's case was a serious omission warranting appellate intervention. The trial judge had misdirected himself in terms of the law and facts.

(3) OKT1 and OKT2 did not adduce any evidence to rebut the presumption under s. 37(da)(iiia) of the DDA 1952. More so when the burden to rebut the presumption of law was based on the balance of probabilities. Therefore, the conviction and sentence of OKT1 and OKT2 under the offence of possession was set aside and replaced with the conviction for the offence of trafficking in dangerous drugs under s. 39B(1)(a) DDA 1952 read together with s. 34 of the Penal Code, along with the sentence under s. 39B(2) of the same whereby both the accused persons was sentenced to the mandatory death penalty.

Kes-kes yang dirujuk:
PP v. Denish Madhavan [2009] 2 CLJ 209 FC ***(dirujuk)***

Perundangan yang dirujuk:
Dangerous Drugs Act 1952, ss. 37(d), (da)(iiia), 39B(1)(a), (2)

Bagi pihak perayu - Naran Singh; T/n Naran Singh & Co
Bagi pihak responden - Kwan Li Sa; TPR

[Nota Pengarang: Untuk kes Mahkamah Tinggi, sila lihat PP v. Vijaya Kumar Tanapalan & Ors [2014] 1 LNS 1760 (menolak sebahagiannya).]

Dilaporkan oleh Suhainah Wahiduddin

PENGHAKIMAN

Mohtarudin Baki HMR:

[1] Ini adalah rayuan bersilang. Untuk memudahkan pemahaman, kami menggunakan terma orang kena tuduh 1 dan 2 (OKT1 dan 2).

[2] Pertuduhan:

> Bahawa kamu pada 5.04.2012, jam lebih kurang 3.00 petang, di bilik pertama (bilik stor) di tingkat atas rumah No. 39, Tkt Zarib 4B, Taman Pinji Mewah, Lahat, Simpang Pulai, Ipoh, di dalam Daerah Kinta, di dalam Negeri Perak Darul Ridzuan, telah mengedar dadah berbahaya iaitu sejumlah berat 24.75 gram (14.59 gram Heroin dan 10.16 gram Monoacetylmorphines) dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan.

[3] Hakim bicara telah memanggil pembelaan OKT1 dan 2 setelah berpuas hati bahawa kes *prima facie* telah dibuktikan. Walau bagaimanapun di akhir kes pembelaan, hakim bicara telah melepas dan membebaskan kedua-dua OKT dari pertuduhan mengedar, sebaliknya mensabitkan kedua-

dua OKT dengan kesalahan memiliki dan menjatuhkan hukuman terhadap tiap-tiap OKT1 dan 2 iaitu hukuman penjara 15 tahun dan 10 sebatan. Hukuman penjara berkuat kuasa dari tarikh tangkapan.

[4] OKT1 dan 2 merayu terhadap sabitan dan hukuman tersebut, manakala Pendakwa Raya merayu supaya OKT1 dan 2 disabitkan di bawah pertuduhan asal iaitu kesalahan mengedar.

[5] Kami telah mendengar rayuan-rayuan kedua belah pihak. Kami sebulat suara telah menolak rayuan OKT1 dan 2, sebaliknya kami membenarkan rayuan oleh Pendakwa Raya. Sabitan dan hukuman hakim bicara diketepikan dan digantikan dengan sabitan di bawah kesalahan pertuduhan asal iaitu mengedar dadah berbahaya. Justeru kami menjatuhkan hukuman mati mandatori terhadap OKT1 dan 2. Berikut adalah penghakiman kami.

Kes *Prima Facie*

[6] Pada 5 April 2012 lebih kurang pukul 3 petang SP4, Insp Wisan a/l Eh Pot bersama pasukan beliau telah membuat serbuan ke sebuah rumah seperti di dalam pertuduhan. Apabila sampai di rumah tersebut, SP4 melihat seorang lelaki (SP3) Tanapalan a/l Periasamy berehat di ruang tamu. SP4 bertanya di mana anak lelaki beliau berada. SP3 memberi isyarat di tingkat atas.

[7] SP4 dan anggota beliau telah naik ke tingkat atas rumah tersebut di mana terdapat tiga buah bilik. Bilik pertama (kemudiannya dikenali sebagai bilik stor) didapati berkunci dari dalam. Pintu dua bilik lain tidak berkunci. SP4 telah mengarahkan anggota beliau untuk memecah masuk pintu bilik stor tersebut.

[8] Apabila pintu tersebut dipecah masuk, SP4 mendapati OKT1 berdiri di hadapan sebuah meja manakala OKT2 pula cuba melarikan diri tetapi berjaya ditangkap.

[9] Di atas meja tersebut ditemui dua peket plastik berisi serbuk disyaki dadah berbahaya dan juga 107 peket plastik kecil juga berisi serbuk yang disyaki dadah berbahaya (rujuk gambar-gambar exh. P8A - B di ms. 241 Jld. 2 rekod rayuan). Selain dari itu juga didapati satu alat timbang, satu sealer, 3 cawan dan satu sudu.

[10] Di akhir kes pendakwaan, hakim bicara telah memutuskan bahawa kes *prima facie* telah dibuktikan terhadap kedua-dua perayu. Rujuk nota keterangan ms. 162 Jld. 1:

> Upon a maximum evaluation of the evidence adduced by the prosecution, I find that the prosecution has established a *prima facie* case against both the accused persons and I hereby call for their defence.

[11] Kami telah merujuk kepada ms. 11 - 12 rekod rayuan jld. I iaitu penghakiman hakim bicara mengenai perkara ini.

> The prosecution relied on independent evidence of possession without invoking the presumption under s. 37(d) of the Dangerous Drugs Act 1952 ("DDA") in that the store room was locked from inside and that the 2 accused persons were the only ones in the store room at that time and that physically they were proximate to the plastic bags containing the proscribed drugs. The prosecution submitted that an inference can be drawn with respect to possession in the fact of exclusion of the store room to others during the time of the raid as it was locked from inside and also their physical proximity to the drugs, coupled with the fact that the second accused tried to escape when the police identified themselves. He failed to escape and was arrested. The circumstance of the arrest is not too dissimilar from the case of *Victor Chidiebere Nzomiwu & Ors v. Public Prosecutor* [2013] 2 MLJ 690.

[12] Seterusnya hakim bicara menerima pakai andaian undang-undang di bawah s. 37(da)(iiia) ADB 1952 bagi elemen "pengedaran". Ini dapat dilihat di ms. 12 rekod rayuan jld. I, iaitu penghakiman hakim bicara:

> The prosecution activated the presumption of trafficking under s. 37(da)(iiia) DDA and as the combined weight of the substance was above 15 grams, the presumption of trafficking is triggered. Upon the close of the prosecution's case and upon a maximum evaluation of the evidence of possession and the trigger of the presumption of trafficking, I had found that the prosecution had proved a *prima facie* case which if unrebutted would warrant a conviction.

Pembelaan

[13] OKT1 telah memberi keterangan bersumpah, manakala OKT2 pula hanya memberi keterangan tanpa sumpah (unsworn statements). Secara ringkas pembelaan kedua-dua OKT adalah seperti berikut:

(i) kedua-dua mereka ditangkap di luar bilik stor berkenaan;

(ii) mereka tidak tahu kewujudan dadah-dadah tersebut di dalam bilik stor itu;

(iii) tombol kunci (door knob) pintu tersebut telah lama rosak semasa rumah itu dibeli oleh SP3; dan

(iv) bilik stor itu boleh dimasuki (accessible) oleh sesiapa sahaja.

[14] Di akhir kes pembelaan, hakim bicara telah membuat penemuan fakta bahawa *mens rea* possession tidak dibuktikan atau keraguan yang munasabah telah berjaya ditimbulkan. Sebaliknya hakim bicara telah mengguna pakai s. 37(d) ADB 1952 mensabitkan kedua-dua OKT di bawah kesalahan memiliki dan melepas dan membebaskan kedua-dua OKT di bawah kesalahan mengedar. Ini jelas bertentangan dengan dapatan fakta dan undang-undang hakim bicara di akhir kes pendakwaan seperti yang dihuraikan di paras. 11 dan 12 di atas.

A **Rayuan OKT 1 Dan OKT 2**

[15] Peguam bela kedua-dua OKT telah berhujah bahawa hakim bicara gagal membuat penemuan fakta sama ada *mens rea* possession telah dibuktikan atau tidak di akhir kes pendakwaan, sebaliknya hakim bicara terus mengguna pakai andaian undang-undang di bawah s. 37(da)(iiia) ADB 1952 bagi elemen pengedaran.

B

[16] Peguam terpelajar telah merujuk kepada penghakiman hakim bicara ms. 162 rekod rayuan Jld. I, di mana dicatatkan:

> Upon a maximum evaluation of the evidence adduced by Prosecution, I find that the Prosecution has established a *prima facie* case against both the accused persons and I hereby call for their defence"

C

Sebaliknya di ms. 200 rekod rayuan jld. I, hakim bicara membuat penemuan fakta di akhir kes pembelaan:

> The room was freely accessible to others in the house and even to the workers of OKT1's sister Ranjini who has a restaurant business nearby and who has used the store room to store the cooking and kitchen paraphernalia.

D

[17] Seterusnya di ms. 200-201 rekod rayuan jld. I, hakim bicara memutuskan:

E

> The 2 accused persons were charged for trafficking of dangerous drugs in a room in a house.
>
> Evidence led by the prosecution was that the drugs were found in the room on a table together with the other paraphernalia of weighing scales, spoons, sealers and the drugs in prepacked plastic bags.

F

> The accused persons were the only 2 persons in the room.
>
> The room was freely accessible to others in the house and even to the workers of OKT1's sister Ranjini who has a restaurant business nearby and who has used the store room to store the cooking and kitchen paraphernalia.

G

> The prosecution says there is direct evidence of possession as the drugs could be clearly visible to anyone occupying the room.
>
> One cannot say that as one would not say that a person in a room would have possession of everything in the room.

H

> More so when the room is accessible to others.
>
> The only way to prove possession is to invoke s. 37(d) DDA with respect to control of the room at the material time when the police raided the room.

I

> I accept the prosecution's evidence that the 2 accused persons were found in the room and that there things containing drugs were on the table.

However to show trafficking the prosecution has to prove some overt act as defined in s. 2 of the DDA where the meaning of "trafficking" is concerned.

Here there is no evidence of them buying, selling, giving, receiving carrying and the like.

What we have here is a case of passive possession.

In their defence they have said they were outside the room but I see no good reason not to believe the police evidence here.

I can still accept their evidence that the drugs are not theirs and also that others have access to the room and in particular the workers in the restaurant who are used to receiving instructions to retrieve things of use for the restaurant from the store room.

Analysing the evidence as a whole the prosecution could not use a double presumption of trafficking but must prove trafficking independently of the presumption in s. 37 (da)(iiia).

Based on the overall evidence I find both the accused guilty on the lesser charge of possession under s. 12(2) punishable under s 39A(2)(d).

[18] Peguam terpelajar berhujah apabila hakim bicara membuat penemuan fakta bahawa *mens rea* possession tidak dibuktikan atau keraguan munasabah berjaya ditimbulkan di akhir pembelaan, kedua-dua OKT berhak mendapat perintah pelepasan dan pembebasan dari pertuduhan. Hakim bicara tidak boleh mengguna pakai andaian mengenai pengetahuan (s. 37(d) ADB 1952) pada tahap ini, kerana di dalam nota keterangan dan alasan penghakiman beliau, tidak ada dinyatakan pemakaian s. 37(d) ADB 1952 semasa memutuskan bahawa kes *prima facie* telah berjaya dibuktikan.

[19] Jika pun hakim bicara mengguna pakai s. 37(d) ADB 1952, apabila beliau menerima fakta bahawa bilik stor accessible kepada orang lain, maka andaian undang-undang di bawah s. 37(d) tersebut telah diakas (rebut) di atas imbangan kebarangkalian. Perayu-perayu berhak kepada pelepasan dan pembebasan dari pertuduhan.

[20] Timbalan Pendakwa Raya (TPR) yang terpelajar bersetuju bahawa hakim bicara adalah khilaf apabila mengguna pakai s. 37(d) ADB 1952 di akhir kes pembelaan, sebaliknya TPR berhujah bahawa hakim bicara telah membuat penemuan fakta bertentangan dengan keberatan keterangan (against the weight of evidences) yang memerlukan appellate intervention.

[21] Kami telah menilai semula keterangan secara maksima mengenai *mens rea* possession seterusnya sama ada keraguan yang munasabah telah ditimbulkan di akhir kes pembelaan terhadap *mens rea* possession.

[22] Dapatan fakta hakim bicara jelas dilihat di ms. 11 rekod rayuan jld. I iaitu penghakiman beliau:

The prosecution relied on independent evidence of possession without invoking the presumption under s. 37(d) of the Dangerous Drugs Act 1952

("DDA") in that the store room was locked from inside and that the 2 accused persons were the only ones in the store room at that time and that physically they were proximate to the plastic bags containing the proscribed drugs. The prosecution submitted that an inference can be drawn with respect to possession in the fact of exclusion of the store room to others during the time of the raid as it was locked from inside and also their physical proximity to the drugs, coupled with the fact that the second accused tried to escape when the police identified themselves. He failed to escape and was arrested.

[23] Seterusnya hakim bicara di ms. 12 rekod rayuan jld. I mengguna pakai s. 37(da)(iiia) ADB 1952 bagi pembuktian elemen pengedaran.

The prosecution activated the presumption of trafficking under s. 37(da)(iiia) DDA and as the combined weight of the substance was above 15 grams, the presumption of trafficking is triggered. Upon the close of the prosecution's case and upon a maximum evaluation of the evidence of possession and the trigger of the presumption of trafficking, I had found that the prosecution had proved a *prima facie* case which if unrebutted would warrant a conviction.

[24] Adalah jelas hakim bicara telah membuat dapatan fakta dan undang-undang bahawa pihak pendakwaan telah membuktikan kes *prima facie* mengenai *mens rea* possession melalui keterangan terus (direct evidence), manakala bagi elemen pengedaran beliau mengguna pakai s. 37(da)(iiia) ADB 1952.

[25] Adalah dirumuskan bahawa hakim bicara telah membuat dapatan fakta di akhir kes pendakwaan bahawa:

(i) pintu bilik stor tersebut dikunci dari dalam.

(ii) hanya kedua-dua OKT berada di dalam bilik stor tersebut, mereka berdiri berhampiran dengan sebuah meja di mana dadah-dadah berbahaya dijumpai (close proximity).

(iii) perlakuan OKT2 cuba melarikan diri tetapi berjaya ditangkap.

(iv) bagi elemen pengedaran pula hakim bicara telah menerima pakai s. 37(da)(iiia) ADB 1952.

[26] Atas alasan di atas hujah peguam bela yang terpelajar bahawa hakim bicara gagal membuat affirmative finding sama ada mengguna pakai s. 37(d) ADB 1952 atau tidak di akhir kes pendakwaan adalah tidak tepat. Hakim bicara tidak diwajibkan memberi alasan beliau apabila memutuskan bahawa kes *prima facie* telah dibuktikan ketika itu.

[27] Walau bagaimanapun hakim bicara telah membuat dapatan yang bertentangan di ms. 43 rekod rayuan jld. 1:

I accept the prosecution's evidence that the 2 accused persons were found in the room and that the plastic bags containing drugs were on the table in the room when the police forced open the door to it. If the prosecution

is seeking to prove possession by direct evidence without the aid of presumption in s. 37(d) DDA, and then to invoke the presumption of trafficking in s. 37(da)(DDA, then after hearing the defence, I am of the view that they had raised a reasonable doubt as to the overall prosecution's case for trafficking.

[28] Persoalan seterusnya, sama ada dapatan hakim bicara bahawa pembelaan telah berjaya mengakas (rebut) andaian undang-undang mengenai pengedaran di bawah s. 37(da)(iiia) ADB 1952.

[29] Dari penelitian alasan penghakiman hakim bicara, adalah jelas hakim bicara selepas mendengar pembelaan memutuskan bahawa bilik stor tersebut boleh dimasuki (accessible) oleh orang lain. Ini menimbulkan keraguan yang munasabah terhadap exclusive control terhadap bilik stor tersebut, justeru OKT1 dan 2 tidak mempunyai kawalan, jagaan dan pengetahuan terhadap dadah-dadah tersebut.

[30] Hakim bicara selepas memutuskan, OKT1 dan 2 tidak mempunyai pengetahuan, beliau mengguna pakai andaian s. 37(d) ADB 1952. Maka andaian di bawah s. 37(da)(iiia) ADB 1952 tidak lagi terpakai untuk mengelak dari pemakaian andaian berganda. Akhirnya hakim bicara memutuskan OKT1 dan 2 bersalah di bawah kesalahan memiliki dan melepas serta membebaskan kedua-dua OKT di bawah pertuduhan asal iaitu kesalahan mengedar dadah berbahaya.

[31] Dari huraian di atas, adalah jelas hakim bicara telah khilaf dari segi fakta dan undang-undang yang serius. Sekiranya beliau memutuskan bahawa keraguan yang munasabah berjaya ditimbulkan terhadap *mens rea* possession, iaitu OKT1 dan 2 tidak mempunyai *mens rea* possession tentang dadah-dadah tersebut, beliau hendaklah melepas dan membebaskan kedua-dua OKT1 dan 2 seperti yang dihujahkan oleh peguam bela yang terpelajar.

[32] Kami telah meneliti semula sama ada dapatan fakta tersebut iaitu OKT1 dan 2 tidak mempunyai *mens rea* possession iaitu kawalan, jagaan dan pengetahuan tentang dadah-dadah tersebut adalah berasas atau bertentangan dengan kekuatan keterangan.

[33] Kami telah merujuk kepada penghakiman hakim bicara di ms. 17 rekod rayuan jld. 1 membuat dapatan fakta:

Thus the case for the defence was that they were not in the store room when they were arrested but rather outside the store room. The first accused said that the door knob had been damaged when his father bought the house and that the door could not be locked either from inside or outside. However, I have no good reason not to believe the evidence of the police who raided the house led by PW4 and forcibly opened the door by breaking the lock of the door. There was no evidence that PW4 Inspector Wisan or any of the police in the raiding team had an axe to grind with the accused persons or that they were otherwise interested witnesses. The evidence of PW6 the IO, Inspector Faiz bin

A Suid, was the door knob had been damaged during the forced entrance to the store room by the raiding team. Both PW4 and PW6 came across as police officers performing the duties assigned to them and in the absence of any evidence inherently improbable, I can accept their evidence as the correct version of what happened during the time of the raid on the store room. I would fall back on the wisdom distilled from the *dictum* B of Thomson CJ (as then was) in *Public Prosecutor v. Mohamed Ali* [1962] MLJ 257 at p. 258).

[34] Dari penemuan hakim bicara terdapat tiga faktor yang kukuh:

(i) SP4 mendapati pintu bilik stor tersebut berkunci dari dalam.

C (ii) apabila dipecah masuk, OKT1 dan OKT2 berdiri bersebelahan dengan sebuah meja dari mana dadah-dadah tersebut dijumpai (close proximity).

(iii) perbuatan (conduct) OKT2 cuba melarikan diri.

[35] Kawalan, jagaan dan pengetahuan perlu dilihat dari keterangan D sekeliling (circumstantial evidence). Dari fakta-fakta di atas adalah menjadi satu irresistible inference bahawa OKT1 dan 2 mempunyai kawalan, jagaan dan pengetahuan terhadap dadah-dadah tersebut.

[36] Isu yang sama telah diputuskan oleh Mahkamah Persekutuan di dalam kes *PP v. Denish Madhavan* [2009] 2 CLJ 209; [2009] 2 MLJ 194:

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> [16] Before proceeding to consider the reasons for the Court of Appeal's decision, we will say a few words about "exclusive" possession. It is inappropriate to speak of possession of an article in criminal law as exclusive possession. One is either in possession or not in possession, although one could be in possession jointly with another or others. To F say that the prosecution of a drug case fails because there has been no proof of exclusive possession is apt to convey the wrong impression that it is only in cases where possession is entirely with one person, - that is, "exclusive" - that a conviction is possible. When the learned trial Judge said "The accused sought to negative the proof of exclusive possession …", we take it that he meant no more than that the respondent sought G to show that he was not in possession of the drugs because he had no knowledge of their existence and that the drugs could have been placed in his bags by some other person or persons.
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> [17] The idea of exclusivity features in the meaning of "possession" in criminal law as one of the elements necessary to constitute possession. H As Taylor J said in *Leow Nghee Lim v. Reg* [1995] MLJ 28:
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> > … It is often said that "possession must be exclusive". This is ambiguous. Possession need not be exclusive to the accused. Two or more persons may be in joint possession of chattels, whether innocent or contraband. The exclusive element of possession means that the possessor or possessors have the power to exclude I other persons from enjoyment of the property.

> Custody likewise may be sole or joint and it has the same element of excluding others. The main distinction between custody and possession is that a custodian has not the power of disposal. The statement that "possession must be exclusive" is often due to confusion of the fact to be proved with the evidence by which it is to be proved. It is essential to keep this distinction clearly in mind, especially when applying presumptions.

[18] Thomson J in *Chan Pean Leon v. Public Prosecutor* [1956] MLJ 237, said that "possession" for the purposes of criminal law involves possession itself - which some authorities term "custody" or "control" - and knowledge of the nature of the thing possessed. As to possession itself he cited the following definition in *Stephen's Digest* (9th Edn), at p. 304), in which the exclusive element mentioned by Taylor J appears:

> A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

[19] Once the elements needed to constitute possession are established, including the element of exclusive power to deal, then what is established is possession, not exclusive possession. So much for exclusive possession.

[37] Satu lagi perkara ialah kegagalan hakim bicara menilai keterangan OKT2 yang diberi tanpa sumpah. Malah perlakuan (conduct) OKT2 yang cuba melarikan diri perlu dilihat secara objektif. Keterangan tanpa sumpah sahaja, tidak membawa nilai probatif yang tinggi untuk menimbulkan keraguan yang munasabah. Kegagalan hakim bicara menguji keterangan pembelaan dengan kes pendakwaan adalah suatu ketinggalan yang serius yang memerlukan appellate intervention. Hakim bicara yang bijaksana juga telah tersalah arah dirinya dari segi undang-undang dan fakta.

[38] Mengenai andaian pengedaran di bawah s. 37(da)(iiia) ADB 1952, kami mendapati OKT1 dan 2 tidak membawa apa-apa keterangan untuk mengakas andaian tersebut. Apatah lagi beban untuk mengakas andaian undang-undang adalah atas imbangan kebarangkalian.

[39] Berdasarkan alasan-alasan di atas, kami sebulat suara menolak rayuan OKT1 dan 2 sebagai tidak bermerit, sebaliknya kami membenarkan rayuan oleh Pendakwa Raya. Sabitan dan hukuman diketepikan dan digantikan dengan sabitan terhadap pertuduhan mengedar dadah berbahaya di bawah s. 39B(1)(a) ADB 1952 dibaca bersama dengan s. 34 Kanun Keseksaan, serta hukuman di bawah s. 39B(2) Akta yang sama iaitu kedua-dua OKT dijatuhkan hukuman mati mandatori.